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No. 06-770

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

vs.

GABRIEL HARDEN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Florida Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is The Florida Anti-Kickback Statute, § 409.920(2)(e), Florida Statutes (2000) Preempted by the Federal Anti-Kickback Statute 42 U.S.C., § 1320a-7b(b)(2) (2000), Since: (1) The Federal Statute Contains a "Knowing and Willful" *Mens Rea* Requirement That is Not Part of The Florida Statute, and (2) The Federal Statute Contains "Safe Harbor" Provision Not Present in The Florida Statutory Scheme?

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STATEMENT OF THE CASE

The Respondent, EDWARD POLSKY, is a licensed dentist who was working at a dental clinic, DENTAL EXPRESS OF SOUTH FLORIDA. The patients treated by Dr. Polsky were primarily children. The clinic also engaged the services of at least two other dentists.

Although the only role attributable to the "dentists" was providing dental care, they were nonetheless named in a nine-count information which included conspiracy, racketeering, and Medicaid fraud charges under § 409.920(2)(e), Florida Statutes (2000). The State characterized the parties' illegality as a "pay for patient" scheme. Respondent Edward Polsky never admitted participating in *any* "scheme", or that any "scheme" existed – no less a scheme to "pay for patients".

The Criminal Information

In December 2000, the Office of the Statewide Prosecutor filed a nine-count information against ten (10) individuals associated with or "employed by" Dental Express of South Florida, Dental Express, Inc., and Express Dental, Inc. – three corporate entities providing dental services to children. The information charged the Respondents with conspiracy, racketeering and Medicaid fraud under § 409.920(2)(e), Florida Statutes (2000). The State alleged that the Respondents engaged in a "pay for patients" scheme, in which individuals received "per head" payments in exchange for soliciting and driving Medicaid-eligible children for dental treatment at the clinics.

Although not spelled out in the information, the Respondent herein, Dr. Edward Polsky, has been acknowledged by the State as being a dentist rendering the actual dental services to patients. The State's case focused on the role of van drivers and how they were compensated. Nothing is stated in the information about the role of Respondent Polsky.

A sworn motion to dismiss was filed in the trial court. The Florida Rules of Criminal Procedure, Rule 3.190(C)(4) provide a procedural mechanism for a defendant to present a set of material facts not in dispute and, based upon those undisputed facts, to establish that a *prima facie* case of guilt against the defendant is absent.

Respondent GABRIEL HARDEN, joined in by the other defendants, pursued such a motion. The case was disposed of on the following undisputed set of material facts:

a. Dental Express and/or Harden hired drivers to pick up patients and transport them to Dental Express to receive dental care.

b. Dental Express and/or Harden conducted background checks on the van drivers, made copies of their credentials, and required the drivers to sign tax forms.

c. Dental Express and/or Harden leased vehicles owned by the drivers to transport children to the facilities, and paid substantial sums in leasing the vehicles.

d. The wages paid to drivers, as well as the lease payments for the vehicles, were documented as business expenses of Dental Express.

e. The drivers were "employees" of the clinics, within the meaning of 42 U.S.C. § 1320a-7b(b)(3)(B) and 42 C.F.R. § 1001.952(i).

f. The drivers were paid on variable rates, depending upon the services provided to the patients.

The trial court accepted as undisputed fact that the Dental Express drivers were "employees", and were paid "per head" for each eligible child transported to the clinic. The trial court granted the Motion to Dismiss and found that the State's prosecution was preempted by both an express provision of the Federal Medicaid Act, 42 U.S.C. § 1320a-7b(b)(3)(B), as well as a parallel administrative "safe harbor" provision, 42 C.F.R. § 1001 952(i). Accordingly, the court held that F.S. 409.920(2)(e) was unconstitutional as applied by the State under the "Supremacy Clause", Article VI, Clause 2 of the United States Constitution. In addition, the court held that a second aspect of Florida's Medicaid Fraud Statute, the *mens rea* requirement found in F.S. § 409.920(1)(d), was preempted by federal law and was unconstitutional on its face under the Supremacy Clause.

All counts of the information against all defendants were dismissed. The State appealed to the District Court of Appeal of Florida, Third District.

The Third District Court of Appeal unanimously held that the trial court was correct in dismissing the information. *State v. Harden*, 873 So.2d 352 (Fla. 3d DCA 2004). The District Court found that the doctrine of implied conflict preemption was applicable, and the Florida Statutory Scheme conflicted with the federal statute in two significant ways:

1. The federal statute contained several so-called "safe harbor" provisions that exclude certain types of payments from being considered "illegal remuneration". 42 U.S.C. § 1320(a)-7b(b)(3)(B) (2000). Specifically, 42 U.S.C., §1320a-7b(b)(3)(B) (2000) protected employer/employee payments for the provision of covered items or services from criminal prosecution. The Florida statute had no such "safe harbor" provisions.

2. The Federal Anti-Kickback Statute contained a "knowing and willful" *mens rea* requirement. Under the federal statute, "in order to establish a 'willful' violation of the statute, the government must prove that a defendant acted with knowledge that his conduct was unlawful", citing *Bryan v. United States*, 524 U.S. 184, 192 (1998). In contrast, the Florida statute only required that the defendant act "knowingly". By definition, the Florida statute included "mere negligent" conduct, an activity the federal statute intended to protect.

For these reasons, the District Court found that there was implied conflict preemption and declared Florida Statute 409.920(2)(e) (2000) unconstitutional.

The State appealed to the Florida Supreme Court.

Supreme Court Decision

The Florida Supreme Court, without dissent, concluded that the "anti-kickback" provision of Florida Statute 409.920(2)(e) was in conflict with federal law and, therefore, preempted by it. *State v. Harden*, 938 So.2d 480 (Fla. 2006).

The Supreme Court made a detailed analysis of the Federal Anti-Kickback Statute – including an historic

overview. It then compared the federal statute with the Florida Statutory Scheme, and noted that the two statutes differed in two important aspects. First, the Florida Statute had a lower *mens rea* requirement which permits an anti-kickback violation based on negligent behavior. Second, the statute did not contain any "safe harbor" exceptions, and did not permit the type of "per head" referral payments made in this particular case, even if the payments were made to a *bona fide* employee.

For these reasons, the Supreme Court agreed with the District Court, that § 409.920(2)(e), Florida Statutes (2000) was preempted by federal law and, thus, unconstitutional under the Supremacy Clause.

The court noted that in 2004, the Florida Legislature amended the statute to conform to the federal *mens rea* requirement. *See*, Chapter 2004-344, § 8 at 2392, Laws of Florida as amended. The statute now provides that the term "knowingly" also includes "willfully".

Reasons For Denying The Writ

Without dissent, the Florida Supreme Court correctly held that the Florida Anti-Kickback Statute was preempted by the analogous federal statute. Applying well-honed principles of preemption, the Florida Supreme Court had no difficulty in finding that the state statute was in conflict with the federal statute, and that "compliance with both federal and state regulations is a physical impossibility", and the state law stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress", citing *Gade v. Nat'l. Solid Waste Management Ass'n.*, 505 U.S. 88, 89 (1992) (plurality opinion). This holding was neither startling, unprecedented or

remarkable. It was based on solid reasoning and consistent with preemption jurisprudence, as announced by this Court.

Preemption Law Was Properly Applied

It is a fundamental constitutional principle that Congress has the power to preempt state law. Article VI, cl. 2, United States Constitution; *Gibbons v. Ogden*, 9 Wheat 1, 211 (1824); *California v. Arc America Corp.*, 490 U.S. 93, 101, 109 S.Ct. 161 (1989). A state cannot assert jurisdiction where Congress clearly intended to preempt a field of law. *See*, *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S.Ct. 1124 (1981). Three classes of preemption have been recognized by this Court: (1) "express preemption", where a federal statute contains explicitly preemptive language; (2) "implied field preemption", where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it; and (3) "implied conflict preemption", where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Gade v. Nat'l Solid Waste Management Ass'n.*, *supra*, 505 U.S. at 98. Even when the federal act does not occupy the field, state law is naturally preempted to the extent of any conflict with a federal statute. *See*, *Hines v. Davidowitz*, 312 U.S. 52, 66-67, 61 S.Ct. 399 (1941). Implied conflict preemption is found when it is impossible for a private party to comply with both state and federal law. *See*, *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372, 120 S.Ct. 2288 (2000); *English v. General Electric Co.*, 496 U.S. 72, 110 S.Ct. 2270 (1990).

Florida's highest court found conflicts between the state statute and the federal statute that were glaring and obvious. The state statute, on its face and as applied, conflicted with the federal statute to such an extent that conduct legal by federal law was illegal under state law.

Facial Conflict - Differing *Mens Rea* Requirements

The *mens rea* requirement of a criminal statute is not a trifling matter. *See*, *Liparota v. United States*, 471 U.S. 419, 424, 105 S.Ct. 2084 (1989). The state and federal anti-kickback statutes were out of balance, as the Florida Anti-Kickback Statute had a lower *mens rea* requirement than the federal statute.

The Florida statute defined "knowingly" as an act "done by a person who is aware or *should be aware* of the nature of his of her conduct, and that his or her conduct is substantially certain to cause the intended result". § 490.920(1)(d), Florida Statute (2000) (Emphasis added). In contrast, the federal statute applies only to those acts that are done "knowingly and willfully". The term "willfully", when used in a federal criminal statute, is a term of art.

Generally, the word "willfully" itself denotes an act which is intentional, or knowing, or voluntary – as distinguished from accidental. *See*, *Felton v. United States*, 96 U.S. 699 (1877). When used in the context of a criminal act it denotes an undertaking with a "bad purpose". In order to establish a "willful" violation of a criminal statute, "the government must prove that the defendant acted with knowledge that his conduct was unlawful". *Ratzlaf v. United States*, 510 U.S. 135, 137, 114 S.Ct. 659 (1994); *Bryan v. United States*, *supra*.

It may well be that a "heightened" *mens rea* standard applies to the Federal Anti-Kickback Statute. At least two Circuit Courts of Appeal have required that a defendant not only know that the statute prohibits offering or paying remuneration for referrals – but, in addition, that they engaged in such referrals with the specific intent to violate the law. *See*, *Hanlester Network v. Shalala*, 51 F.3d 1390, 1400 (9th Cir. 1995); *United States v. McClatchey*, 217 F.3d 823 (10th Cir. 2000). *See, also*, *Cheek v. United States*, 498 U.S. 192, 198, 111 S.Ct. 604 (1991).

The Petitioner suggests that the different *mens rea* standards between the two statutes is "inconsequential", because they criminalize the same intentional act of making referral payments. (p. 20, Petitioner's Writ) This argument is simply untenable, and ignores the basic tenets of criminal law. Under the federal statute, it is not enough that one intentionally makes referrals, but that the referrals must be done with knowledge that to do so is wrong. The culpable mental state threshold under the Florida statute is much lower than its federal counterpart. Mere negligent conduct can give rise to a criminal conviction, while under federal law that same conduct is not criminalized. While the "willfulness" standard under the federal statute is still up for grabs, it will never be less than the Florida state statute.

The State's argument, that the *mens rea* discrepancies between the former Florida statute and the federal statute are "inconsequential", is further undermined by its own charging document. Respondent Polsky's only association with the Dental Express was as a dentist. It is precisely this type of dragnet prosecution, where anyone even remotely connected with a Medicare provider could be charged, that Congress sought to avoid. This prosecution

is not "inconsequential" to Respondent Polsky, who had nothing to do with the management of Dental Express, who was not an owner or principal, but was merely brought in to render dental care. Congress intended to protect such remote individuals by requiring proof that not only did the dentist "knowingly and willfully" violate the statute, but that he "acted with an evil-meaning mind – that is to say, that he acted with knowledge that his conduct was unlawful". *See*, *United States v. Starks*, 157 F.3d 833, 838 (11th Cir. 1998). The state statute provided no such protection, and criminalized that which was legal under federal law.

The Petitioner, State of Florida, does not contest the fact that in 1980 Congress amended the Anti-Kickback Statute by adding a "knowingly and willfully" *mens rea* element, and that the stated purpose of doing so was prompted by a concern that criminal penalties imposed under current law applied to an individual "whose conduct, while improper, was inadvertent", (*H.R. Rep.*, 96-1167 at 59 (1980), reprinted in 1980 U.S.C.C.A.N. 5526, 5572, Petitioner's Initial Brief, p. 9) – the precise conduct impermissible under the state statute.

The Petitioner has lost sight of the fundamentals by confusing the right of a state to have more stringent regulations than a federal statute, and the right of a state to have more stringent regulations which conflict with that federal statute. Nowhere in our system of government is a state permitted to criminalize that which is legal under federal law. A state can enhance a penalty for a parallel state/federal violation. A state can criminalize that which is not covered by federal statute. However, a state cannot prosecute an individual for conduct allowable under federal law. This is precisely what the Florida State

Anti-Kickback law did – both on its face and as applied to these particular Respondents. The Petitioner's position seeks havoc and a fundamental re-balance of state and federal power. Congress expressed no difficulty in having the state police their own laws and, in fact, required them to do so. *See*, 42 U.S.C., § 1396b(q)(3). This did not mean, as the Petitioner suggests, that the states were free to undermine practices specifically authorized by Congress.

Safe Harbor Provisions

The state statute contains no exceptions, or "safe harbors". These safe harbors were authorized by Congress to protect relatively innocuous commercial arrangements which may technically run afoul of the federal statute. These safe harbor exceptions are found at 42 C.F.R. §§ 1001.952(a)-(v) (2005). There are presently some twenty-three safe harbors. The purpose of these provisions was to give guidance and assistance to healthcare providers as to what business practices were legal. One of those safe harbors provides that an "illegal" remuneration (kick-back) "does not include any amount paid by an employer to an employee, who has a *bona fide* employment relationship with an employer". 42 C.F.R. § 1001.952(i) (2005). The regulation embraced the same definition of "employee" as used under the Internal Revenue Service Code.

The trial court found as undisputed that the van drivers were *bona fide* employees, and the Respondents herein were protected by the federal safe harbor provisions. Both the District Court and the Supreme Court concurred that the Respondents fell within the protection of the employee/employer relationship, and that having employees assist in the solicitation of business was proper

so long as a true employee/employer relationship existed. In support of this reading, the Supreme Court cited numerous pronouncements from the Office of the Inspector General of the Department of Health and Human Services (O.I.G.), Medicare, and state healthcare programs: Fraud and Abuse, O.I.G. Anti-Kickback Provisions, 56 Fed. Reg. 35, 952 and 35, 953 (July 19, 1991); Medicare and Medicaid Programs; Fraud and Abuse, O.I.G. Anti-Kickback Provisions, 54 Fed. Reg. 3088, 3093 (January 23, 1989). Turning to the case law, the Florida Supreme Court, finding no case directly on point, looked to such decisions in *United States ex rel. Obert-Hong v. Advocate Health Care*, 211 F. Supp. 2d 1045 (N.D. Ill. 2002); *New Boston General Hospital, Inc. v. Texas Workforce Comm'n.*, 47 S.W.3d 34 (Tex. App. 2001), and compared them to such cases as *United States v. Starks*, *supra*, and *United States v. Polin*, 194 F.3d 863 (7th Cir. 1999).

The Florida Supreme Court noted "a glaring distinction" was between the arrangements upheld in *Obert-Hong* and *New Boston*, and those deemed illegal in *Polin* and *Starks*. The Court found the defining differences in the plans that were upheld as legal, that the payments were made to *bona fide* employees.

Based upon the limited precedent regarding the applicability of the employee safe harbor to various payments, and in light of the stated intention of the safe harbors, the Supreme Court agreed with the Third District Court and the trial court, that the "particular pay arrangement at issue involves protected employee/employer payments for the provisions of covered items". *State v. Harden*, *supra*, at 495.

The Petitioner's construction of the safe harbor provision is unnecessarily narrow and contrary to its plain language. The safe harbor provision found in 42 C.F.R., § 1001.952(i) protects a *bona fide* employee in the "furnishing of any item for which payment may be made in whole or part under Medicare, Medicaid or other federal healthcare programs". The state statute criminalizes the receipt of a "remuneration" in return for referring an individual for the furnishing of "any item or service for which payment may be, in whole or in part, under the Medicare Program . . . or in obtaining, purchasing, leasing, ordering or arranging . . . any goods, facility, item, or service for which payment may be made, in whole or in part, under the Medicare Program, § 409.920(2)(e), F.S. (2000)".

It seems obvious that the safe harbor and the Florida statute cover the same conduct. Either the conduct is covered by the safe harbor provision or it is simply not illegal under the state statute. Under the latter construction a safe harbor is provided, and under the former the conduct is not illegal.

CONCLUSION

FOR THE REASONS STATED ABOVE, THE WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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